

Triple H Electric Co., Inc. and International Brotherhood of Electrical Workers, Local 1516, AFL-CIO. Case 26-CA-17268

April 25, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On December 4, 1996, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and a cross-exception.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.

The General Counsel cross excepts to the judge's inadvertent failure to include the Respondent's unlawful threat to discharge union members in his recommended Order and notice to employees. We find merit in this exception, and we shall modify the Order and notice accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Triple H Electric Co., Inc., Sheridan, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² With respect to the judge's conclusion that the Respondent violated Sec. 8(a)(1) and (3) of the Act by terminating Kenneth Freeman, we note that the usual criteria for establishing a prima facie case have been met and not rebutted. See *Wright Line*, 251 NLRB 1083 (1980).

The judge rejected several different explanations offered by the Respondent regarding its termination of Freeman. Where an employer's stated motive for discharging an employee is false, the inference is justified that the employer desires to conceal the true motive and that the true motive is unlawful, at least where, as here, the surrounding facts tend to reinforce the inference. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (1966); *Wright Line*, supra.

In adopting the judge's conclusion that the Respondent unlawfully interrogated Marvin Rouse and Ed Tankersley, Chairman Gould finds it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

There are no exceptions as to complaint allegations that the judge dismissed.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

"(c) Unlawfully threatening to discharge union members."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make Kenneth Freeman and Kelly Bedard whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

3. Substitute the following for relettered paragraph 2(e).

"(e) Within 14 days after service by the Region, post at Sheridan, Arkansas, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 1996."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Brotherhood of Electrical Workers, Local 1516, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT unlawfully threaten to discharge union members.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Kenneth Freeman and Kelly

Bedard full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth Freeman and Kelly Bedard whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Kenneth Freeman and Kelly Bedard, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TRIPLE H ELECTRIC CO., INC.

Bruce E. Buchanan, Esq., for the General Counsel.
Scott Summers, Esq., David Crittenden, Esq. (R. T. Blankenship & Associates), of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. The General Counsel and the Charging Party, International Brotherhood of Electrical Workers, Local 1516, AFL-CIO (the Union or IBEW), contend that Triple H Electric Co., Inc. (Respondent or Triple H) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it allegedly interrogated Marvin Rouse and Edward Tankersley regarding union membership when they sought employment on January 4, 1996. It is also alleged that Respondent refused to hire Rouse and Tankersley or consider them for employment because of their union membership. Further, Respondent is said to have coercively interrogated union electrician Fred Smith on January 4, 1996. Triple H denies these allegations.

The General Counsel further contends that Respondent violated Section 8(a)(1) and (3) of the Act in terminating the employment of Kenneth Freeman on January 25, 1996, and in terminating Kelly Bedard on January 29, 1996. Triple H maintains that Freeman was laid off for lack of work and that Bedard had previously abandoned his job.

For the reasons stated below, I conclude that Respondent violated Section 8(a)(1) in interrogating Rouse and Tankersley regarding their union affiliation on January 4, 1996. However, I find that Respondent did not coercively interrogate Fred Smith. Additionally, I conclude that the General Counsel has not established that Respondent refused to hire or consider Rouse and Tankersley for employment because of their union membership. On the other hand, I find that Respondent violated Section 8(a)(1) and (3) of the Act in terminating Kenneth Freeman and Kelly Bedard.

FINDINGS OF FACT¹

I. INTERROGATIONS AND REFUSAL TO HIRE

Respondent was the electrical subcontractor during the construction of a Wal-Mart Superstore in Paragould, Arkansas, between October 1995 and May 1996. It is a nonunion contractor, although it has entered into one or more wage agreements with locals of the IBEW, other than Local 1516, prior to the fall of 1995.

At the beginning of the Paragould project, Respondent worked with less than half a dozen employees, most of whom were permanent employees of Triple H (G.C. Exh. 4; Tr. 245-246). In December 1995 and January 1996, it hired a number of additional employees for this project, most of whom were not permanent employees. On December 21, it hired Kenneth Freeman, a journeyman electrician and member of IBEW Local 1516. On December 28, it hired another union member, Kelly Bedard, who is a master electrician. Respondent was unaware of either of these employees' membership in the Union until January 3, 1996. On January 3, Bedard handed a document to leadman Ricky Wells,² which stated that he was a member of local 1516 and was at the site "to work and also exercise my rights to organize" (G.C. Exh. 12; Tr. 149-152). Wells immediately gave the paper to Respondent's project superintendent, Richard Norwood (Tr. 151).

Both Wells and Norwood told Bedard that if he was going to organize, he must do it on his own time. Norwood also told Bedard that he knew how much work a master electrician could do, and if Bedard did not produce this much work, Norwood would terminate him (Tr. 152).

On January 4, 1996, at about 7 a.m., Fred Smith, another union member went to the Paragould Wal-Mart to ask Respondent for a job (Tr. 127). He first spoke to Ricky Wells, who told him that Respondent needed more people. However, Wells told Smith that he would have to talk to Superintendent Norwood, who did all the hiring (Tr. 127). Norwood initially offered Smith a salary of \$10 per hour, but raised it to \$12 per hour to offset Smith's commuting costs. Norwood did not ask Smith whether he was a union member before hiring him.

While Smith was still talking to Norwood, Ricky Wells gave Norwood a document he had just received from Kenneth Freeman. This document, identical to the one submitted by Kelly Bedard, informed Respondent that Freeman was a union member, who was on the site to "work and also exercise my rights to organize" (Tr. 200-201; G.C. Exh. 18). Norwood exclaimed something to the effect of "how in the hell are we hiring these union people" (Tr. 201). Norwood then asked Smith if he was also a member of the Union.³

¹ Jurisdiction and the status of the Charging Party as a labor organization under the Act are admitted by Respondent.

² The General Counsel contends that Wells was a supervisor. For reasons stated below I find that this has not been established.

³ I credit the testimony of Smith, Freeman, and Bedard with regard to this conversation. Norwood testified that he did not recall asking Smith if he was a union member; he did not categorically deny that he asked this question (Tr. 317). Wells testified that Norwood did not say, "[W]hy the hell are we hiring all these union people" (Tr. 356-357). However, I credit the testimony of the three union members to the contrary. The statement strikes me as something a person in Norwood's position would be likely to say after receiving the dec-

Smith answered affirmatively. Norwood then asked Smith if he had his tools and Smith went to work (Tr. 129-130).

At about 3 p.m. on January 4, 1996, Marvin Rouse and Ed Tankersley, master electricians and union members, went to the Paragould Wal-Mart. They were directed to Wells and Norwood, who were standing together (Tr. 86-87). Tankersley told Wells and Norwood that he and Rouse were electricians and asked if they were hiring. Either Norwood or Wells asked if Rouse and Tankersley had an Arkansas electrician's license. The two job applicants answered that they had master electrician's licenses. Norwood or Wells asked if Rouse and/or Tankersley were union members (Tr. 87, 111).⁴ They answered affirmatively. Either Norwood or Wells then made a comment about having a union employee with a master electrician's license to the effect that he "didn't know how long he [the union employee] was going to be there." (Tr. 87, 111.) They then said they were going to try to finish the job with the employees already on hand (Tr. 111).⁵ Rouse and Tankersley were asked to write their names, addresses, and phone numbers on a 3-by-5 inch slip of paper (G.C. Exh. 10; Tr. 87-88). They then left the site. Rouse and Tankersley made no further inquiries about employment at the site and never heard anything from Respondent.

After the visit of Rouse and Tankersley to the Wal-Mart site, Respondent hired other employees for this project. On January 10, 1996, it hired Derek Loney, an apprentice/helper. On January 19, it hired Jeremy Wells, who was one of its permanent employees, and the son of Ricky Wells, as a helper. On January 24, it hired Danny Duckworth, an apprentice. On February 2, it hired Robert Jones as a helper. On February 23, it brought Bobby Moore, one of its permanent journeymen electricians to the project. On March 1, it brought Sam Heird, a permanent employee who was an apprentice, to the Wal-Mart site (G.C. Exh. 4).

II. THE TERMINATIONS OF KENNETH FREEMAN AND KELLY BEDARD

Between January 22 and 29, 1996, Respondent terminated the employment of Fred Smith, Kenneth Freeman, and Kelly Bedard, the three union members working at the Paragould Wal-Mart. On January 22 or 23, Superintendent Norwood informed Smith that it was letting him go because he asked too

many questions and was taking up too much of his foreman's time (Tr. 144-145).

larations from Freeman and Bedard, who had been working for him for a week or two without his knowing that they were union members.

⁴Wells denies asking any job applicant whether he was a union member (Tr. 354). However, I credit the testimony of Tankersley and Rouse over his testimony on this issue. At the hearing Wells had no recollection of Tankersley and Rouse (Tr. 350-351). Norwood has no recollection of talking to these electricians either (Tr. 40). However, G.C. Exh. 10 establishes that Rouse and Tankersley were at the project as they allege (Tr. 38-39). Further, it seems likely to me that Norwood and Wells would ask about union membership after finding out that day that they had three union employees on their job.

⁵Rouse testified that Wells initially told him that Respondent needed a few men (Tr. 87). Tankersley's testimony does not indicate that either Wells or Norwood indicated that Respondent was hiring additional employees. I find that no such statement was made. Wells and Norwood strike me as too sophisticated to have told Tankersley and Rouse that they were hiring and then tell them the opposite after finding out that they were union members.

many questions and was taking up too much of his foreman's time (Tr. 144-145).

On Wednesday, January 24, 1996, Kelly Bedard returned to the jobsite after missing work the prior Friday, Monday, and Tuesday. As soon as he got to work he gave Ricky Wells a document informing Respondent that he was going on an "an economic and unfair labor practice strike" (G.C. Exh. 13; Tr. 155-156, 179). Bedard told Wells that unlawful questions were being asked and he asked why Respondent had fired Fred Smith (Tr. 156).

Bedard then went outside and picketed the jobsite with his wife and Smith. While he was on the picket line, Superintendent Norwood came out to speak with him (Tr. 320-321). Bedard told Norwood he was striking because Respondent had fired Fred Smith. Norwood responded that Bedard did not know what Smith had done which caused him to be fired (Tr. 321). He said nothing about Bedard's recent absences (Tr. 337).

On January 25, 1996, Norwood terminated Kenneth Freeman, allegedly for lack of work. According to Norwood, Freeman asked for a day off to take care of personal business. Norwood asserts that he laid Freeman off because his portion of the work on the project was almost completed. (Tr. 20-23; G.C. Exh. 4).⁶

Bedard continued to picket the jobsite for several days (Tr. 187). Either he or somebody else from Local 1516 called the Paragould city inspector to report that Respondent was not properly tightening the nuts on electrical terminals (Tr. 287-291).⁷ On January 29, Bedard handed Norwood a note declaring that he had "decided to end his unfair labor practice strike and return to work unconditionally" (G.C. Exh. 14). Norwood told Bedard that he had abandoned his job (Tr. 158, 322).

Bedard had missed 3 consecutive work days for two reasons. The babysitter for Bedard's children had become ill on Friday, January 19. Bedard came to the jobsite, left his child in his car and tried to find Norwood or Wells to tell them he would not be able to work that day. He did not find them but told another employee, Anthony Edge, why he would miss work and asked him to inform Wells or Norwood. There is insufficient evidence to establish that Edge did so (Tr. 159-160, 202, 318, 392-393, and 396).

On Monday, January 22, Bedard was ill. He missed work and did not attempt to notify Respondent that he would be absent from work. On Tuesday, January 23, Bedard still felt ill. Since Triple H did not have a telephone at the jobsite, Bedard called the Company's headquarters office in Sheridan, Arkansas.⁸ He asked for "Bobby Hale."⁹ Bedard spoke to someone in the Sheridan office for 2 minutes starting at 8:01 a.m. and told them he was sick but would be at work the next day (G.C. Exh. 15 [Bedard telephone bill]; Tr. 161-163). Nothing was said to Bedard about abandoning his job until January 29 (Tr. 163, 322).

⁶Freeman denies asking for the day off (Tr. 204).

⁷The city inspector found no loose nuts when he went to the site (Tr. 289-290).

⁸There was a telephone in the general contractor's trailer at the Wal-Mart construction site.

⁹There is no "Bobby Hale" who works for Respondent. The owners of Triple H are William B. Hale and his sons, William R. (Randy) and Chris Hale (Tr. 237-238).

III. ANALYSIS AND CONCLUSIONS

A. The Interrogation of Marvin Rouse and Ed Tankersley on January 4, 1996, Violated Section 8(a)(1) of the Act

Having found that Richard Norwood or Ricky Wells inquired as to the union membership of Marvin Rouse and Ed Tankersley, I conclude that Respondent violated Section 8(a)(1) of the Act as alleged. Although I decline to conclude that Wells was a supervisor,¹⁰ I conclude that if he, rather than Norwood, made the inquiry he did so as Respondent's agent. If he conducted portions of this interview he had apparent authority to speak for Triple H.

Given the context of the conversation, Rouse and Tankersley had reasonable cause to believe that Wells spoke for management, *Community Cash Stores*, 238 NLRB 265, 266 (1978); *Beaird Industries*, 311 NLRB 768 (1993); and *Albertson's Inc.*, 307 NLRB 787 (1992). This is particularly true since Wells asked about union affiliation in Norwood's presence and Norwood gave no indication that he disapproved of the inquiry or that Wells did not have authority to ask these questions, *Van Pelt Fire Trucks*, 238 NLRB 794, 798 (1978); and *Berger Transfer & Storage*, 253 NLRB 5, 12 (1980).

Questions posed by an employer concerning an employee's union membership may or may not be unlawful. The determinative factor is whether, considering all the circumstances, the questions reasonably tend to restrain or interfere with the employee's exercise of rights guaranteed by the Act, *Rossmore House*, 269 NLRB 1176 (1984). However, inquiries regarding union membership during a job interview are inherently coercive and thus violate Section 8(a)(1), *Service Master*, 267 NLRB 875 (1983); *Gilbertson Coal Co.*, 291 NLRB 344, 348 (1988); and *Bendix-Westinghouse Automotive Air Brake Co.*, 161 NLRB 789, 792 (1966). Therefore, I find that Respondent violated Section 8(a)(1) in asking whether Rouse and Tankersley were union members, regardless of whether the question was asked by Norwood or Wells.

B. The Statement made on January 4, Regarding Kelly Bedard's Continued Employment by Respondent Violated Section 8(a)(1)

Similarly, the comment made by Norwood or Wells to Rouse and Tankersley that a union master electrician might not be on the job much longer (Tr. 111) restrained and interfered with the exercise of their Section 7 rights. In the context of their job interview Rouse or Tankersley had already been asked about their union membership and their licenses.

¹⁰ Sec. 2(11) of the Act defines a supervisor as an individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or having responsibility to direct them, or adjust their grievances, or effectively to recommend such action. The testimony of many witnesses establishes that Wells did not have the authority to hire employees. Although Wells did direct employees to some extent, this appears to be a situation in which new employees went to Wells because he had worked for Respondent and for Norwood for some time. I do not believe this required the type of independent judgment that would establish him to be a supervisor, even if Norwood did call him a foreman, on occasion, *Adco Electric*, 307 NLRB 1113, 1120 (1992), and cases cited therein.

For Respondent's representatives to say without further explanation that a union master electrician might not be at the site much longer can only suggest that Respondent was looking for a way to get rid of him at least in part due to his union membership. It also suggested that Rouse and Tankersley's union membership might be held against them.

C. The Inquiry Made to Fred Smith on January 4, 1996, Regarding Union Membership Did Not Violate Section 8(a)(1)

The inquiry made to Fred Smith after he was hired, however, did not violate the Act. Nothing in the context of the inquiry indicates an element of coercion or interference with Smith's Section 7 rights, *Rossmore House*, supra. After being asked whether he was a union member, Smith was asked whether he had his tools and was sent to work. The General Counsel also alleges that Respondent violated the Act by asking Smith about the union membership of two job applicants on January 8. I am unable to credit Smith's testimony that such an inquiry was made. There is no evidence that anyone applied for a job on or about that date. The last union members to apply for a position with Respondent at the Wal-Mart were Rouse and Tankersley on January 4.¹¹

D. Respondent did not Violate Section 8(a)(1) and (3) in Refusing to Hire Marvin Rouse and Ed Tankersley or Failing to Consider them for Employment

Union members Marvin Rouse and Ed Tankersley applied for employment at the Wal-Mart site on January 4. They were interrogated regarding their union membership and never heard from Respondent afterwards. Nevertheless, I am unable to conclude that Respondent discriminated against them on the basis on their union membership in failing to hire them or consider them for employment. It is implicit that Rouse and Tankersley were seeking work as journeymen or as master electricians. Earlier that day Respondent had hired Fred Smith, a journeyman electrician and union member. Respondent hired no more master electricians and only one journeyman electrician during the duration of the project.

Between January 4, and February 2, 1996, Triple H hired four employees but all were apprentices or helpers, who were paid considerably less than journeymen or master electricians like Rouse and Tankersley (Tr. 80-81; G.C. Exhs. 4 and 5).¹² There is no indication that Respondent needed any more journeymen or master electricians during this period. One cannot infer discrimination from the fact that Respondent hired additional employees at less sophisticated job classifications.

¹¹ The General Counsel also alleges that Respondent violated Sec. 8(a)(1) when Ricky Wells told an employee that Triple H would not be hiring any more union employees on January 24. Having found that the General Counsel has not established that Wells was a supervisor I conclude that this statement, if made, is not imputable to Respondent. There is also insufficient evidence that Wells was acting with the apparent authority of Triple H if he made this remark.

¹² G.C. Exhs. 4 and 5 establish that the employees hired after January 4 were paid as follows: Derek Loney \$6 per hour; Jeremy Wells \$6 per hour; Danny Duckworth \$9 per hour; Robert Jones \$9 per hour; Bobby Moore \$11.50 per hour; and Sam Heird \$10 per hour. Fred Smith, Kenneth Freeman, and Kelly Bedard were all paid at a rate of \$12 per hour.

The only journeyman hired for this project after January 4, was Bobby Moore, a permanent employee of Respondent, who came to the Paragould Wal-Mart on February 23, 1996 (G.C. Exh. 4; Tr. 245-248). I cannot infer discriminatory motive from Respondent's using Moore rather than Rouse and Tankersley. It is a legitimate business practice to give preferential treatment to a permanent employee such as Moore; see, *B E & K Construction Co.*, 321 NLRB 561, 569 fn. 29 (1996).

E. The Termination of Kenneth Freeman Violated Section 8(a)(1) and (3) of the Act

I conclude that the termination of Kenneth Freeman's employment on January 25, 1996, violated Section 8(a)(1) and (3) of the Act. A prima facie case of discrimination has been established. Between January 25 and 29, 1996, all three union employees at the Wal-Mart site were terminated involuntarily by Respondent. Management knew these employees were union members and was aware that Freeman and Bedard had declared their intention to organize the worksite. The interrogations of Tankersley and Rouse, and Norwood's comments to Bedard indicate that Respondent was not indifferent to the presence of union members in its work force.

Given this background, the fact that only union members were involuntarily terminated during this period creates an inference that these terminations were related to these employees' membership in Local 1516, absent a reasonable alternative explanation, *American Wire Products*, 313 NLRB 989 (1994); and *Otis L. Broyhill Furniture*, 94 NLRB 1452, 1453 (1951). This inference satisfies the General Counsel's burden for establishing a prima facie case as set forth in *Wright Line*, 251 NLRB 1083 (1980). The question then becomes whether Respondent met its burden of proving that Freeman was terminated for nondiscriminatory reasons.

I conclude that Respondent has not met this burden. First, there is no indication that Freeman was hired to work on one or several discrete parts of the project. Thus, I am not persuaded that it was legitimate for Respondent to lay Freeman off because any particular part of the project was almost completed. If the need for journeymen electricians had declined, there is no convincing explanation as to why Freeman was laid off—other than the fact that he was a union member.

Seniority does not explain the selection of Freeman for layoff. William Brooks was a journeyman electrician, who like Freeman was paid \$12 per hour and was not a permanent employee of Respondent. He was hired after Freeman and worked at Wal-Mart until March 14 (G.C. Exh. 4 and 5; Tr. 79). Similarly, Anthony Edge, who was hired after Freeman, worked at the site until March 30. Edge was a master electrician, making \$13 per hour and was not one of Respondent's permanent employees.

The selection of Freeman for layoff is not explained by his job performance. Bennie Overton, who was also not a permanent employee of Respondent, was hired a few days before Freeman at \$14 per hour. Superintendent Norwood did not think much of the quality of his work and described him as "overpaid" (Tr. 32-33). If Norwood needed one less electrician, one would think he would lay off Overton, who was paid \$2 per hour more than Freeman. However, Overton continued working at the site until April 4, 1996.

Finally, Norwood's testimony regarding Freeman's job performance suggests that Freeman was discharged because of his union membership. The superintendent stated that Freeman's work was initially pretty good. However, Norwood testified that after a couple of weeks Freeman's attitude and work methods changed (Tr. 310). While there is nothing in the record to explain why Freeman's attitude towards his job would change, there is an explanation for why Norwood's perception of Freeman's job performance changed. It was after about 2 weeks on the job that Freeman informed Respondent that he was a union member and intended to assist in organizing the project.

Norwood contends that prior to laying Freeman off he also became aware that Freeman had intentionally failed to complete assigned work in a manner that could have caused a fire (Tr. 63-67). I do not find Norwood's testimony credible on this matter. First, when Norwood told Freeman that he was laying him off, he said nothing about uncompleted work. He told Freeman that he was being laid off because the work in the McDonald's and delicatessen portions of the Wal-Mart was almost finished (Tr. 313). Moreover, neither Norwood nor Wells believed that work had been done intentionally in an improper manner until the Paragould city inspector came to the site to investigate a complaint made by the Union against Respondent (Tr. 66, 381).¹³

F. Respondent's Refusal to Allow Kelly Bedard to Return to Work on January 29, 1996, Violated Section 8(a)(1) and (3) of the Act

With regard to Kelly Bedard, the key question is whether Respondent's contention that Bedard abandoned his job is a sufficiently reasonable explanation for its refusal to allow him to return to work at the conclusion of his strike. If so, it would indicate that Triple H would have refused to let Bedard return to work even if he had not been a union member and engaged in protected activities.

I conclude that Bedard did not abandon his job and that Respondent did not have a legitimate basis for concluding that he had done so. Bedard's testimony, that he tried to notify Respondent on Friday, January 19, of his inability to come to work, is corroborated by Respondent's witness Lyndal (Greg) Stuart. Stuart testified that he saw Bedard at the worksite that morning and that Bedard told him that he had to return home because of problems with his child's babysitter (Tr. 392-393).

On Monday, January 22, Bedard was ill and did not call in. He was still sick on Tuesday and called Respondent's headquarters office in Sheridan because there was no telephone in Respondent's trailer in Paragould. General Counsel's Exhibit 15, Bedard's phone bill, indicates he was on the phone for 2 minutes. Thus, I conclude that Bedard told somebody in that office that he was ill but would be at work on Wednesday. Assuming the individual Bedard talked to

¹³I do not believe Norwood's testimony that he knew work was not completed intentionally and that it could have caused a fire before January 25. He did not decide to file a complaint with the Paragould police until February 21 (Tr. 66). I also have taken into the account the fact that Lyndal Gregory Stuart, who, according to Norwood, discovered much of the incomplete work, was not asked about it when called to testify for Respondent (Tr. 311-312, 385-396).

was not a supervisor, it is reasonable to assume that Bedard's message was transmitted to a supervisor. Thus, I conclude that Respondent was on notice on January 23 that Bedard intended to return to work.

January 24, was Bedard's first day at work following the discharge of union member Fred Smith. Thus, there was no reason for Respondent to believe that Bedard abandoned his job in going directly to the picket line.¹⁴ Indeed, Bedard told Norwood on January 24, that Smith's discharge was one of the reasons he was going on strike.

Given the fact that Bedard was not told that he had abandoned his job on January 23, when he spoke with Triple H headquarters personnel or by Superintendent Norwood on January 24, I conclude that Respondent's stated reason for refusing Bedard's unconditional offer to return to work on January 29, 1996, was pretextual. The real reasons were his union membership and his protected activities. Therefore, I conclude that his termination violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By interrogating Marvin Rouse and Ed Tankersley on January 4, 1996, regarding their union membership and intimating that it was about to discharge Kelly Bedard, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating the employment of Kenneth Freeman on January 25, 1996, and refusing to allow Kelly Bedard to return to work on January 29, 1996, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

¹⁴Nothing in the record indicates that Respondent required employees to call in on any day that they missed work or that Respondent had any disciplinary policy with regard to failing to do so—even for several days.

¹⁵Reinstatement and backpay issues in the construction industry will ordinarily be resolved during the compliance process rather than by resorting to presumptions as to how long the discriminatee would have remained employed by the Respondent, *Dean General Contractors*, 285 NLRB 573 (1987).

¹⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Triple H Electric Co., Inc., Sheridan, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 1516 of the International Brotherhood of Electrical Workers, or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kenneth Freeman and Kelly Bedard full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Sheridan, Arkansas copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."